FILED
JUN 24 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1930

UNITED STATES OF AMERICA,

Respondent,

v.

WALTER E. JEFFRIES,

Petitioner.

Petition for a Writ of Certiorari to
The District of Columbia Court of Appeals

NICHOLAS A ADDAMS
1707 N Street, N.W.
Washington, D.C. 20036
Attorney for Petitioner

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

INDEX

	Page
JUDGMENT AND OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS	2
QUESTIONS PRESENTED	2
FACTUAL STATEMENT	3
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	16
APPENDIX	1a
Order of the District of Columbia Court of Appeals denying reheearing *en banc*	1a
Order of the District of Columbia Court of Appeals denying rehearing by panel	3a
Opinion of the District of Columbia Court of Appeals	4a
Judgment of the District of Columbia Court of Appeals	14a
Closing Argument of Prosecutor	15a
Rebuttal Argument of Prosecutor	28a

Table of Cases

	Page
Anderson v. United States, ___ U.S. App. D.C. ___, ___ F.2d ___, App. No. 72-1848 (May 21, 1974)	12
Berger v. United States, 295 U.S. 78 (1935)	10
Hawkins v. United States, 156 U.S. App., D.C. 259, 480 F.2d 1151 (1974)	3
Kotteakas v. United States, 328 U.S. 750 (1946)	12
Krulewitch v. United States, 336 U.S. 440 (1949)	10
McFarland v. United States, 80 U.S. App. D.C. 195, 150, F.2d 593 (1965)	9
Nash v. United States, CA 2d, 54 F.2d 1006 (1932)	10
Neil v. Biggers, 409 U.S. 188 (1972)	14
Phillips v. United States, 155 U.S. App. D.C. 93, 476 F.2d 538 (1973)	3
Whitmore v. United States, 156 U.S. App. D.C. 263, 480 F.2d 1154 (1973)	3, 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

UNITED STATES OF AMERICA,

Respondent,

v.

WALTER E. JEFFRIES,

Petitioner.

Petition for a Writ of Certiorari to
The District of Columbia Court of Appeals

WALTER E. JEFFRIES, Petitioner, herein, respectfully prays that a *Writ of Certiorari* issue to review the judgment of the District of Columbia Court of Appeals, entered in the above-entitled case on March 25, 1974.

OPINION BELOW

The Opinion of the Court of Appeals (See Appendix 4A, *et seq.*) is not yet officially reported, __A.2d __ , but is reported in the Washington Law Reporter at 102 WLR 605.

JURISDICTION

The Court of Appeals denied rehearing *en banc* and by the panel on March 25, 1974 (Appendix 1A, 2A). The judgment of the Court of Appeals was entered on February 21, 1974 (Appendix 14A). The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISION

Constitution, 5th Amendment:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law,"

QUESTIONS PRESENTED

1. Whether a defendant is denied Due Process of Law under the Fifth and Fourteenth Amendments, where the Court of Appeals placed on a defendant the burden of surmounting a standard of "beyond a reasonable doubt" prejudice, *vis-a-vis* reasonable likelihood of prejudice – suffered from over 30 inflamatory and otherwise prejudicial remarks made by a United States prosecutor in closing and rebuttal argument in a criminal trial. This is a recurring problem and draws into focus whether Courts of Appeal can blink at standards set by the United States Supreme Court in *Berger v. United States*, 295 U.S. 78 (1935) and *Kotteakos v. United States*, 328 U.S. 765 (1946).

2. Whether, in a single witness identification case – in which science, logic and the government's own medical witness precluded such an identification – the Court of

Appeals can ignore the standards for single witness identification cases set forth in *Neil v. Biggers*, 409 U.S. 188 (1972) and in effect *sub silento* override it.

FACTUAL STATEMENT

Introduction

Petitioner, Walter E. Jeffries, and one Raymond Smith, were convicted of shooting one Leon Jackson in the back of his body in a dark alley, approximately 12:30 a.m. on April 19, 1972. Someone at the scene (but who did not testify), told Jackson that Petitioner and Smith did it. Jackson was the only alleged "identification" witness, this being the only evidence on the issue of guilt.

During the trial, the prosecutor was admonished on several occasions for indicating his approval or disapproval of Jackson's answers during cross-examination of Jackson, in front of the jury seeking their affirmation. This behavior by the prosecutor spanned over 100 pages of transcript.

The prosecutor, in his closing and rebuttal arguments, made over 30 highly prejudicial, impassioned, and inflammatory remarks.[1]

---

[1] The prosecutor herein was the same prosecutor in which the U.S. Court of Appeals for the District of Columbia Circuit, involving no less than 6 different judges, reversed 3 cases on grounds of the prosecutor's prejudicial and inflammatory closing and rebuttal arguments:

> *United States v. Phillips*, 155 U.S. App. D.C. 93, 476 F.2d 538 (1973); *United States v. Hawkins*, 156 U.S. App. D.C. 259, 480 F.2d 1151 (1973); *United States v. Whitmore*, 156 U.S. App. D.C. 263, 480 F.2d 1154 (1973).

Facts

Jackson rendezvoused with his girl friend, Marion Fletcher, about 7 or 8 o'clock p.m. on April 18, 1972. They parted company shortly thereafter, agreeing to meet later that evening.

Jackson got tired of waiting for Marion, and went looking for her to tell her he was mad and going home. Around 12:30 a.m., April 19, Jackson went into an alley[2] and saw Marion talking to another girl.

As he was walking in a northerly direction towards Marion, Jackson saw two men, wearing big floppy hats, walking towards him in a southerly direction. *He did not pay any mind or attention to them* as he was concentrating on Marion. He was on one side of the alley, and they were on the other side. As they passed him, *he did not look over at them and did not recognize them.*[3] The men were somewhere between 15 and 30 feet behind him when they called his name. Jackson *started to turn around and was shot twice,* both shots being almost simultaneously, one after the other. *Jackson was hit immediately, before he got turned all the way around.* Jackson saw the backs of the men running down the alley and then around the corner. Immediately after the shooting, Marion allegedly came up and told Jackson that Petitioner and Smith shot him.[4]

---

[2] There were only 2 lights in the alley; sometimes one or both worked or did not work.

[3] Jackson claims to have seen Petitioner on a prior occasion.

[4] Marion was not called by the government and did not testify.

Jackson described the dress of the taller assailant,[5] as having a long knee-length coat, a big wide-brim hat and gloves. Jackson did not notice any facial features of this person, such as a thin long face with a beard and a mustache, all features of Petitioner's face.

On cross-examination, Jackson testified that at the time of these events, he was taking the drug "Desoxyn." Jackson did not recall if he took "Desoxyn" on the day he was shot but he was supposed to take it every day and was supposed to take it whenever he was hungry. Specifically on April 18, Jackson did not think he had anything to eat prior to his going to meet Marion. While he waited for Marion from 7:00 p.m. on until approximately 12:30 a.m., he had a couple of beers.

During cross-examination of Jackson, it was brought to the court's attention that the prosecutor continually shook his head, expressing approval or disapproval with Jackson's answers. The prosecutor's visual expressions and nodding of his head during cross-examination of Jackson was brought to the court's attention a second time. And the court itself on a third occasion admonished the prosecutor to stop nodding his head or shaking his head to indicate agreement or disagreement with Jackson's testimony seeking the jury's affirmation. This behavior of the prosecutor spanned over 100 pages of the transcript.

Doctor Morris M. Pachman was the surgeon who operated on Jackson for his wounds. Testifying for the government, he said *both bullets entered the rear of Jackson's body;* to wit, one bullet entered the left buttock posteriorly (the doctor demonstrated the place of entry

---

[5] Petitioner was supposed to be the taller assilant.

by pointing to the middle of his left, rear pants pocket) and the second bullet entered Jackson's elbow from the rear and exited from the front.

* * *

Petitioner presented an alibi defense. His mother and girlfriend placed him at home about an hour before the shooting and continuously to the next morning. A medical doctor and several co-workers testified to a foot injury Petitioner sustained a day or two before the shooting, requiring the use of a crutch to walk at the time of the shooting.

In view of Jackson's testimony regarding his "Desoxyn" drug usage and alcoholic beverage consumption on the evening of the shooting, Petitioner proffered the medical doctor to testify on the effects of the drug combined with the alcohol on his ability to see. The court precluded this expert medical testimony.

* * *

Since one of the two questions presented involves the prosecutor's inflammatory and prejudicial jury arguments, it would be unfair to summarize those arguments here. The Court is requested to read those arguments in their entirety, reproduced in the appendix, at pages 14a through 38a.

* * *

Jeffries was sentenced to 13-39 years incarceration.

* * *

REASONS FOR GRANTING THE WRIT

FIRST

PETITIONER WAS DENIED DUE PROCESS OF LAW BECAUSE THE COURT OF APPEALS APPLIED A "BEYOND A REASONABLE DOUBT" STANDARD TO THE PREJUDICE SUFFERED BY PETITIONER AS A RESULT OF THE PROSECUTOR'S PREJUDICIAL CLOSING AND REBUTTAL ARGUMENTS.

The prosecutor, in his closing and rebuttal arguments, made more than 30 remarks that highly prejudiced Petitioner's trial. Generally the remarks fell into the following major categories:

a) Arguing matters not in evidence;
b) Inflaming the jury's passions by placing them in the shoes of the victim;
c) Arguing to the jury that the "presumption of innocence" rule did not apply as much to Petitioner as to someone accused of a lesser crime;
d) Calling Petitioner's witnesses "liars."

Arguing Facts Not In Evidence:

On several occasions, the prosecutor, without evidentiary foundation, alluded to why Mary[6] did not testify:

> "And do you know what's really interesting? The testimony shows that this woman or lady named Mary is just too scared to come and testify. She didn't want to get involved . . ." (Appx. 21a).

* * *

---

[6] Marion was alternately referred to as "Mary" during the trial

"Mary would not come to testify. She was so scared. Isn't it interesting if it's not this Buddy[6a] that they asked for, that she said on the scene it was Buddy and Smith, how come she's so scared and won't come to testify? Isn't that interesting, ladies and gentlemen? If she was scared and it's not this Buddy, she should come in here and say it, because she wouldn't be scared of anything, would she? But she's scared, ladies and gentlemen. She's not coming to visit us here . . ." (Appx. 25a).

Additionally, the prosecutor on no less than 6 occasions referred to Jackson as being scared and perspiring (Appx. 15a, 22a, 23a, 29a).

Inflaming Jury's Passions:

The prosecutor stated:

". . . Now, think how you would be. You're gunned down, you're on your knees, the lights are on and two men in gangster outfits . . . (Appx. 25a).

* * *

I say to you, ladies and gentlemen, be careful. (Appx. 27a).

* * *

[6a] Petitioner's nickname was "Buddy".

". . . Because these men that called Leon Jackson in a dark alley, and dressed like gangsters, and go boom, boom with guns, aren't the kind of men that are entitled to even walk down an alley. They belong somewhere else. And we know why. These are killers if you believe Mr. Jackson, and killers must be taken from Washington streets, wherever they are so that sleepy people in the city can go to sleep and not be scared that their spouse might not come home . . ." (Appx. 28a).

Additionally, the prosecutor made at least 9 references to Jeffries (and Smith) as being gangsters or wearing gangster clothing (Appx. 14a, 19a, 24a, 25a, 27a, 28a, 38a) and on other occasions referred to Petitioner as a "warrior in the night" (Appx. 33a, 34a) and a young buck.

The above passages speak for themselves. They show a carefully calculated and blatant plan to coerce and overtly pressure the jury to bring in a guilty verdict. Appealing to passions and fears of jurors is a reprehensible trial tactic not to be tolerated. *McFarland v. United States,* 80 U.S. App. D.C. 195, 150 F.2d 593 (1965).

Different Standard of Presumption of Innocence:

The prosecutor urged the jury that a lesser standard of "presumption of innocence" applied to Petitioner because of the seriousness of the crime (Appx. 27a).

Calling Witnesses "Liars":

The prosecutor told the jury that all of Petitioner's witnesses (except the doctor) were not telling the truth and were liars (Appx. 26a).

Appealed to Jury's Sympathy:

The prosecutor on no less than 6 occasions referred to Jackson as being scared and courageous to come to court. (Appx. 15a, 22a, 23a, 29a).

The trial court's two isolated paragraphs of alleged curative instructions (Appx. 7a, 8a) failed horribly, as do all such attempts. Such limiting instructions are a "recommendation to the jury of a mental gymnastic which is beyond, not only their powers but anybody's else," Judge L. Hand, *Nash v. United States*, C.A.2d, 54 F.2d 1006, 1007 (1932). The "naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction." Justice Jackson, concurring, *Krulewitch v. United States*, 336 U.S. 440, 453 (1949). No amount of curative instruction would have been sufficient to cure the prosecutor's highly prejudicial conduct herein.

The prosecutor's performance herein violated every standard of conduct established by this Court 40 years ago in *Berger v. United States*, 295 U.S. 78, 88 (1935):

> ". . . The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall

> win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one . . ."

The prosecutor struck egregiously foul blows here. The prosecutor's dozens of prejudicial statements, cannot be dismissed as can one or two isolated or momentary aberrations or as mere zeal. Rather, it was a deliberate and calculated successful effort to prejudice Petitioner in the eyes of the jury and to produce a wrongful conviction. Evidence of the prosecutor's calculated effort was his statement to the court, out of the presence of the jury, that he *paid a lot of attention to this argument.* Such reprehensible tactics cannot be tolerated, as so well stated by Circuit Judge Robb in *United States v. Whitmore,*

> "The prosecutor's conduct was not an isolated momentary aberration occurring in the heat of trial, but was a deliberate, calculated and successful effort to prejudice the defendant by references to matter that was not in evidence. Such tactics cannot be tolerated". (156 U.S. App. D.C. 263, 266, 480 F.2d 1154, 1156, 1973).

The Court of Appeals, after reciting 7 areas of prosecutor prejudicial conduct comprising over 25 specific instances

(Appx. 6a, 7a),[7] concluded that these more than 25 instances "[did] not rise to the level of substantial prejudice." While the Court of Appeals used the words "substantial prejudice," it actually established a "beyond a reasonable doubt prejudice" standard. Counsel cannot imagine what more the prosecutor could have said, and how many more times the prosecutor would have had to make such admittedly prejudicial remarks, before the Court of Appeals would be satisfied. To avoid reversal, the error must be harmless beyond a reasonable doubt. *United States v. Anderson*, __U.S. App. D.C. __, __ F.2d__, App. No. 72-1848, decided May 21, 1974.

This was an extremely tenuous case for the prosecutor. Jackson's own testimony reveals he did not see his assailants, but was told two names by someone who did not testify. He paid absolutely no attention to the assailants as they passed him (*supra*, page 4). The alley was dark and the men were big, floppy hats. He was shot twice immediately as he started to turn (*supra*, page 4) and he did not get turned all the way around (*supra*, page 4). The prosecutor's own medical expert, Dr. Pachman, categorically testified both bullets entered Jackson's body from the rear. This all adds up to a factual, scientific and logical impossibility for Jackson to have seen his assailants' faces.

In a case as close as this one then, the correct standard of prejudicial prosecutor misconduct is one of "reasonably likely to cause prejudice to a defendant's case." This is really the *Berger* standard, restated in different language in *Kotteakas v. United States*, 328 United States 750, 765 (1946):

---

[7] The decision omitted numerous other instances of misconduct.

> "[I]f one cannot say, with fair assurance, after pondering all that happened *without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error,* it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." [Emphasis added.]

As opposed to a question of sufficiency of the evidence on appeal where the record is viewed in the light most favorable to the prosecutor, the inquiry here requires a balanced reading of the record in a common sense fashion to determine whether or not it can reasonably be said that the error infected the verdict.

Without stripping the prosecutor's innumerable egregious improprieties from this case, there is no doubt that these improprieties had a substantial influence and the jury's verdict was likely swayed. The D.C. Court of Appeals cannot sit in its ivory tower and guess as to the effect on the jury. This Court's relevant constitutional standards established in *Berger* and *Kotteakos* were brought to the Court of Appeals' attention by appellate counsel. Neither case was discussed or applied by the Court of Appeals. We cannot have constitutional standards which are ignored by Courts of Appeals.

Outright reversal is warranted on the record herein. Alternatively, certiorari is warranted to prevent Courts of Appeals from blinking at U.S. Supreme Court mandates.

SECOND

IN A SINGLE WITNESS IDENTIFICATION CASE, WHERE FACTS, SCIENCE, LOGIC AND THE PROSECUTION'S OWN MEDICAL EXPERT CAST SUBSTANTIAL DOUBT ON THE WITNESS' ABILITY TO OBSERVE, THE COURT OF APPEALS CANNOT IGNORE THE STANDARDS FOR SUCH CASES SET FORTH IN *NEIL* V. *BIGGERS*.

Appellate counsel brought the relevant standard of *Neil v. Biggers*, 409 U.S. 188 (1972) to the Court of Appeals' attention both in the main brief and in a petition for rehearing *en banc*. The Court of Appeals neither mentioned *Neil v. Biggers*, nor discussed the criteria thereof.

In *Neil v. Biggers*, Justice Powell, speaking for the Court, set forth the due process criterial for preventing misidentification:

> As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include:
>
> [1] the opportunity of the witness to view the criminal at the time of the crime,
>
> [2] the witness' degree of attention,
>
> [3] the accuracy of the witness' prior description of the criminal,
>
> [4] the level of certainty demonstrated by the witness at the confrontation, and
>
> [5] the length of time between the crime and the confrontations (409 U.S. 188, 199).

The most logical factor to look at first is, the opportunity for the victim to view the assailant; because, absent other evidence, if 'no such opportunity' existed, then

suppression of identification testimony or directing an acquittal is warranted.

Opportunity to Observe:

We have shown above that it was scientifically and logically impossible for Jackson to have seen his assailant's faces, *supra,* page 4.

Contrast Jackson's complete lack of "opportunity to view" with the abundant opportunity in *Biggers.* The rape victim in *Biggers,* spent several minutes in face-to-face, close proximity contact with her assailant in the lighted hallway of her own home, as well as 15 minutes or so in the same face-to-face contact outside under a full moon.

Prior Descriptions:

Jackson gave only a clothing description, in addition to a general height, weight, age description. He did not describe any of the prominent features of Jeffries' face (*supra,* page 5).

Witness Degree of Attention:

By his own testimony, Jackson *paid absolutely no attention* whatsoever to his assailants (*supra,* page 4).

The Court of Appeals cannot be permitted to ignore constitutional standards established by *Neil v. Biggers,* and reversal is required.

CONCLUSION

When all is said and done, the stark fact remains that Petitioner was convicted, and sentenced to a lengthy prison term, as a result of the Court of Appeals applying an unreasonable standard of prejudice caused by blatantly egregious prosecutorial misconduct and the failure of the Court of Appeals to apply relevant constitutional standards of single-witness identification cases. Correction of this raw abuse of judicial power is required to prevent a mockery of our judicial system of appellate review. The petition should be granted.

Respectfully submitted,

Nicholas A Addams
1707 N Street, N.W.
Washington, D.C. 20036
202–785-1250
Counsel for Petitioner

DISTRICT OF COLUMBIA
COURT OF APPEALS

March 25, 1974

WALTER R. JEFFRIES, etc.,
Appellant,

v.

UNITED STATES,
Appellee.

Case No. 49136-72-A-C-D

BEFORE: Reilly, Chief Judge, Kelly, Fickling, Kern, Gallagher, Nebeker, Pair, Yeagley and Harris, Associate Judges.

* * * * *

ORDER

The clerk is directed to file appellant's lodged supplemental memorandum to argument III of his petition for rehearing and/or rehearing *en banc*, and upon consideration thereof, and of appellant's petition for rehearing *en banc*, and it appearing no judge of this court has called for a vote thereon, it is

ORDERED that appellant's petition for rehearing *en banc* is hereby denied.

PER CURIAM.

Copies to:

Honorable Tim Murphy
Judge, Superior Court of the District of Columbia.

Clerk, Superior Court of the District of Columbia.

Nicholas A Addams, Esquire
1707 N Street, N.W.
Washington, D.C. 20036
Attorney for Appellant.

John A. Terry, Esquire
Assistant U.S. Attorney
Attorney for Appellee.

DISTRICT OF COLUMBIA
COURT OF APPEALS

March 25, 1974

WALTER R. JEFFRIES, etc.,
Appellant,
v.
UNITED STATES,
Appellee.

Case No. 49136-72-A-C-D.

BEFORE: Reilly, Chief Judge, Fickling and Harris, Associate Judges.

* * * * *

ORDER

On consideration of appellant's petition for rehearing, it is

ORDERED that appellant's aforesaid petition is denied.

PER CURIAM.

Copies to:

Honorable Tim Murphy
Judge, Superior Court of the District of Columbia.

Clerk, Superior Court of the District of Columbia.

Nicholas A Addams, Esquire
1707 N Street, N.W.
Washington, D.C. 20036
Attorney for Appellant.

John A. Terry, Esquire
Asst. U.S. Attorney
Attorney for Appellee.

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 7184

RAYMOND L. SMITH, a/k/a RONALD M. JOHNSON,
APPELLANT,

v.

UNITED STATES, APPELLEE.

No. 7317

WALTER R. JEFFRIES, a/k/a WALTER T. JEFFRIES,
a/k/a RAYMOND SMITH, JR., APPELLANT,

v.

UNITED STATES, APPELLEE.

Appeals from the Superior Court of the
District of Columbia

(Argued December 4, 1973 Decided February 21, 1974)

David C. Niblack, appointed by this court, for appellant in No. 7184.

Nicholas A. Addams for appellant in No. 7317.

William D. Pease, Assistant United States Attorney, with whom *Harold H. Titus, Jr.*, United States Attorney, and *John A. Terry*, Assistant United States Attorney, were on the brief, for appellee.

[205]

Before REILLY, Chief Judge, and FICKLING and HARRIS, Associate Judges.

FICKLING, *Associate Judge:* Appellants Raymond L. Smith and Walter R. Jeffries were convicted in a jury trial of assault with intent to kill while armed (D.C. Code 1973, §§ 22-501, 22-3202), assault with a dangerous weapon (D.C. Code 1973, § 22-502), and carrying a pistol without a license (D.C. Code 1973, § 22-3204). Appellants raise a number of issues: (1) prosecutorial misconduct; (2) certainty of complainant's identification; (3) denial of motions for severance; (4) refusal to allow expert testimony; and (5) failure to give missing witness instruction. We affirm.

On April 18, 1972, between 7 and 8 p.m., Leon Jackson met his girl friend, Marian Fletcher, and two other women in the vicinity of Fourteenth and T Streets, N.W. Jackson talked to Miss Fletcher for approximately five minutes; during their conversation she asked him if he had ever heard of "Cadillac" Smith. Jackson replied that he had not, and Miss Fletcher then pointed to appellant Smith and a second man, Charles "Rough House" McGill, who were standing together a short distance away. Jackson and Miss Fletcher subsequently parted company but agreed to meet later that evening. Jackson remained in that area to wait for Miss Fletcher's return.

At approximately midnight he became impatient and began looking for Miss Fletcher in order to tell her that he was returning to Annapolis.[1] Jackson came to an alley which runs between T Street and Wallach Place, parallel to Fourteenth Street, where he saw Miss Fletcher talking

[1] Jackson was a cook at the United States Naval Academy in Annapolis.

with another person. Jackson began walking down the alley toward Miss Fletcher, who, upon seeing Jackson, waved at him as if to tell him to go back. At the same time, Jackson saw two men walking toward him from the other end of the alley but he paid no attention to them. The men passed Jackson and then called out his name. He turned and saw that each man was holding a pistol. The shorter of the two men fired one shot which hit Jackson in his left buttock. Almost simultaneously with the first shot, the taller of the two men stepped forward; and, as Jackson fell to the pavement, the tall man fired a second shot which hit Jackson's left elbow as he raised his arm to protect himself. He saw their faces and recognized the taller of the two men as "Buddy" Jeffries, with whom he had had an altercation the preceding Saturday. The shorter man he recognized as "Cadillac" Smith, whom Miss Fletcher had pointed out earlier in the evening. The two assailants fled the scene and Miss Fletcher came over and held Jackson's head as he lay in the alley. On cross-examination at trial, counsel for appellant Jeffries elicited from both Jackson and Sergeant Carpenter of the Metropolitan Police Homicide Squad that Miss Fletcher had told Jackson after the shooting that appellants had been the ones who had shot him.

Two days later Sergeant Carpenter visited Jackson at the hospital. Jackson was shown a group of ten photographs, among which was included a photograph of each appellant.[2] Jackson positively identified each appellant's photograph and gave Sergeant Carpenter their corresponding nicknames.

---

[2] Sergeant Carpenter had previously received appellants' names as possible suspects from a confidential informant.

During their conversation at the hospital, Sergeant Carpenter recalled that Jackson described appellant Jeffries as having been a Negro male, in his twenties, about 6'3" tall, weighing 150 pounds, wearing a black leather coat, black boots and gloves. Appellant Smith was described as a Negro male, in his twenties, about 5'11" tall, weighing 165 pounds, with short hair, wearing a red leather coat and a red and white "gangster" hat. Although it was not reflected in his notes, Sergeant Carpenter recalled that Jackson described appellant Jeffries as wearing a similar type of hat.

At a lineup on June 6, 1972, Jackson identified appellant Jeffries. At another lineup held on July 26, 1972, he identified appellant Smith.

Appellant Jeffries presented a defense of alibi. His mother, Connie Jeffries, testified that on April 18 appellant Jeffries returned to their home in northeast Washington sometime between 11 and 11:30 p.m., ate dinner, and went upstairs to soak his injured foot. Mrs. Jeffries' testimony as to appellant Jeffries' whereabouts on the evening of April 18 was essentially corroborated by his girl friend, Garnetta Phillips.

Appellants' principal contention is that certain comments of the prosecuting attorney throughout the trial were so prejudicial as to require reversal.[3] During either his opening, closing, or rebuttal arguments to the jury, the prosecutor stated: (1) that Marian Fletcher was "too scared to come and testify"; (2) that appellants were "killers"; (3) that they were "warriors in the night"; (4) that they were "dressed like gangsters";

[3] The Assistant United States Attorney who represented the government on this appeal is not the prosecutor whose trial tactics are questioned in this opinion.

(5) that appellant Jeffries was a "young buck"; (6) that a guilty verdict would be a matter of achievement and courage; and (7) that the presumption of innocence rule might not apply as much to the appellants as it might to others in less serious cases. After careful consideration of these alleged instances of prosecutorial misconduct, we hold in this case that these alleged errors do not rise to the level of substantial prejudice, which is necessary in order to reverse. *Garris v. United States*, D.C.App., 295 A.2d 510 (1972); *Cross v. United States*, 122 U.S.App.D.C. 283, 353 F.2d 454 (1965).

To determine whether the prosecutor's misconduct caused substantial prejudice, the applicable test is:

> [W]hether we can say, "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." The decisive factors are the closeness of the case, the centrality of the issue affected by the error, and the steps taken to mitigate the effects of the error. [*Gaither v. United States*, 134 U.S.App.D.C. 154, 172, 413 F.2d 1061, 1079 (1969) (citations omitted); *Garris v. United States, supra* at 512.]

Throughout the trial the court carefully restricted the jury's consideration to the relevant issues by admonitions and correcting instructions. Midway through the trial, the court instructed the jury to ignore the term "young buck" since it was irrelevant to the case. After the prosecutor's closing argument, the trial court instructed the jury as follows:

> THE COURT: Ladies and gentlemen of the jury, during the prosecution's closing remarks he made some comment as to why the lady, Miss

> Fletcher, was not here and that she was not here because she was scared or otherwise. She's not here and the police officer couldn't find her. We don't know what's going on in her mind or why she's not here. The fact is that she isn't and the police officer couldn't find her. Now, why she's not here is unknown and not in the record. With reference to the defendants being killers; the defendants are not charged with killing. They're charged with assault with intent to kill. So killers presupposes a fact already having happened which did not occur in this case, and of course the term was improperly applied. . . .

Immediately after the prosecutor's rebuttal argument, the court instructed the jury:

> THE COURT: Ladies and gentlemen, in argument Mr. Robinson again referred to their being dressed in those kind of clothes [gangster style] and coming down the alley. The Court admonishes you that the type of clothing relating to identification has nothing to do with their guilt or innocence or nothing to do with this case.

We presume, unless the contrary appears, that the jury understood and followed the court's instructions. *Hall v. United States*, 84 U.S.App.D.C. 209, 211, 171 F.2d 347, 349 (1948). The jury, in addition, "must be credited with enough common sense and discrimination to enable them to evaluate properly conduct and remarks of counsel even when they offend ordinary standards of propriety." *Hall, supra* at 212, 171 F.2d at 350. In the instant case there was nothing to suggest that the jury did not comprehend and respect the admonitions of the trial court.

Moreover, the question of whether the improper remarks by the prosecutor required reversal was considered by the trial judge in a motion for a new trial. On review, "[m]uch reliance should be placed upon his judgment of the matter." *Hall, supra* at 212, 171 F.2d at 350. As the court stated in *United States v. Goodman*, 110 F.2d 390, 394 (7th Cir. 1940):

> It is peculiarly within the knowledge of the trial judge whether remarks of counsel during the trial tend to prejudice the cause of a party. The courtroom atmosphere, prior remarks which have provoked the questioned statements, and other factors which cannot be appraised by a reviewing court may render remarks of counsel innocuous, although they may appear viciously prejudicial when removed from their setting....

Lastly, "[i]t is generally held that whether improper conduct of Government counsel amounts to prejudicial error depends, in good part, on the relative strength of the Government's evidence of guilt." *Jones v. United States*, 119 U.S.App.D.C. 213, 214 n.3, 338 F.2d 553, 554 n.3 (1964); *accord, Garris, supra* at 512. Here, the evidence against the appellants cannot be fairly characterized as "paper thin." The government's proof established that Leon Jackson recognized the two men who had shot him as persons he had seen prior to the shooting. The government further established that Jackson positively identified appellants' photographs, assigning appellants' nicknames to the appropriate pictures, and positively identified appellants both at formal police lineups and in court. During the trial Jackson's credibility and powers of recollection were fully tested throughout lengthy direct and cross-examinations. Jackson's testimony therefore, if believed, constituted strong evidence of appellants' guilt.

[211]

Thus, because of the strength of the government's case and because of the correcting instructions by the trial judge and his commendable effort to keep the prosecutorial misconduct at a minimum, we do not think these alleged errors reached the level of substantial prejudice.

Appellants' next contention concerns the identification testimony of Leon Jackson. Appellant Smith contested the certainty of Jackson's identification of him at the lineup on July 26, 1972. At the lineup Jackson stated, "I think it's number 6 [appellant Smith]." The government, however, called Mr. Jackson as a rebuttal witness; he testified that he was sure of his identification of Smith at the lineup and that the statement, "I think it's number 6," was just a phrase of speech. Appellants do not contend the photographic and lineup identifications of them by Jackson violated any constitutional standards, but rather they argue the testimony of Jackson—the only identification witness—was inherently unreliable, raising the likelihood of misidentification; therefore, the court should have granted their motion for acquittal. *See United States v. Telfaire*, 152 U.S.App.D.C. 146, 147-48, 469 F.2d 552, 554-55 (1972) (per curiam).

This contention is not well founded. Jackson had seen his assailants on previous occasions. He had ample opportunity to observe them during the shooting. He identified them at the photographic session, at the lineups, and in court. The trial judge thought Jackson's testimony had "a ring of truth to it." It cannot be said, therefore, that under these circumstances there was a very substantial likelihood of misidentification. Consequently, we think the court correctly denied the motion for acquittal.

Appellant Jeffries asserts that it was error for the court to deny his motions to sever his case from that of

appellant Smith.[4] He argues that appellant Smith, who gained notoriety under the nickname "Cadillac," was so infamous a criminal that the jury could not give his defense impartial consideration. We disagree.

Whether appellants should have been tried together or severally was within the sound discretion of the trial judge. *E.g., Hill v. United States*, 135 U.S.App.D.C. 233, 418 F.2d 449 (1968); Super. Ct. Cr. R. 14. The trial judge, moreover, should only grant severance when the situation is such that the exercise of common sense and sound judicial judgment leads one to conclude that the defendant cannot have a fair trial. *Allen v. United States*, 91 U.S.App.D.C. 197, 202, 202 F.2d 329, 334, *cert. denied*, 344 U.S. 869 (1952).

In the instant case the trial judge took enough precautions to insure that appellant Jeffries received a fair trial. Prior to trial the court instructed all parties that Mr. Smith should not be referred to by the nickname "Cadillac," and during trial that nickname was scrupulously avoided. In addition, the prospective jurors were asked whether they had any knowledge of "Cadillac" Smith's reputation, and those jurors who said they had such knowledge were excused. Accordingly, we think the trial judge did not abuse his discretion when he overruled the motions for severance.

Appellant Jeffries' next contention concerns his proffer of the expert medical testimony of Dr. Oliver on the effect the drug Desoxyn has on the ability to see. The court ruled counsel for appellant Jeffries would not be

[4] Motions were made prior to the trial and again at the start of the trial.

permitted to inquire of Dr. Oliver as to the effects of this drug.

Similarly, we do not think the trial court abused its discretion in precluding this testimony. There was no evidence that Jackson had taken a high dosage of Desoxyn on the day of the shooting. The only evidence of drug usage by Jackson was his testimony that he took one tablet of Desoxyn a day as prescribed by his doctor for weight control. He said the drug did not make him "high," and that he could not remember whether he took a tablet on the day of the shooting. Thus to raise, through the testimony of Dr. Oliver, the inference that Jackson had taken a high dosage of Desoxyn which affected his ability to see would have been impermissibly speculative.

Appellant Jeffries' final contention—that it was error for the court not to give the missing witness instruction for Marian Fletcher—is without merit.

It is elementary "that a party's failure to utilize a witness 'peculiarly within his power to produce . . . whose testimony would elucidate the transaction' permits an inference that the testimony would have been unfavorable." *Wynn v. United States*, 130 U.S.App.D.C. 60, 64, 397 F.2d 621, 625 (1967) (footnotes omitted). In the instant case Jackson's testimony established that Miss Fletcher could have elucidated the events in question had she been available, but it was not within the power of the government to produce her as a witness. The testimony of both Jackson and Sergeant Carpenter established that Miss Fletcher had been neither seen nor heard from since the night of the shooting, even though considerable effort on the part of the police had been

made to contact her and secure her appearance for trial. Her absence having been satisfactorily explained, the court properly exercised its discretion to deny appellant Jeffries' request for a missing witness instruction.

Affirmed.

APPENDIX B

CLOSING ARGUMENT - (GOVERNMENT)

MR. ROBINSON: May it please the Court. Ladies and gentlemen, Leon Jackson is a good man in his own way. And I'm sure as you deliberate you'll remember that scared individual up there who, when he left the stand, was perspiring and wet; whether that was from fear or whatever, we'll leave it up to your own conclusion. But Leon Jackson is a good man, isn't he? He's a man that perhaps wasn't doing the right thing, having that common law wife, by coming here to Washington. But I'm sure he didn't anticipate and didn't deserve all the trouble he got from a particular individual named Buddy, and this man here named Mr. Smith. Leon Jackson, for 20 years, has worked in the government. The defense tried to paint Mr. Jackson as some kind of a cat that comes to town and uses bam, and runs around with some lady that frequents 14th Street. And as some man who tried to murder a man one time, and pled guilty to that. And tried to paint him as some man charged with carrying a P.38 with a bullet in the chamber. And that he was the closest thing to Al Capone this side of the Mississippi River. That's what they tried to paint Mr. Jackson to be. Now, look at Mr. Jackson back there; he's a simple man and a good man. And we submit to you that ten years ago he got into some trouble, had an argument with some women, and ten years later, history repeats itself. He finds himself with another problem. He's in town with a woman he shouldn't be with, and its' just too much trouble for him to handle. Ladies and gentlemen, he didn't deserve what he got. Leon Jackson for 20 years was a good government worker. Some of you may be government workers, and you know you wouldn't be with the government if you

were a bad individual. It's a proud job. If you violate the conditions of employment, you don't stay on for 20 years. Twenty years is a long time. Think how long it's been since Harry Truman has been in the White House; and that's how long it's been since Mr. Jackson has been working with the government. Way back 20 years, 1952.

So let's move on now and explain to you why Mr. Buddy Jeffries and this mysterious Mr. Smith are guilty of trying to murder a good man. These men who were described as dressed like *gangsters* came down a dark alley, and came down that alley with guns, and they came down there with a purpose. They came down there because Leon Jackson, this little man, this dumpty little man, who came to town and was about to use the restroom and was pushed around by a Mr. Buddy, as he described him – this man had dared to go back and get a P.38 and come back and point at this man right here. And you don't point guns at these two men right here, (indicating) oh! no – It's not enough that Mr. Jackson went to jail on Saturday night, had his car totaled when a theft occurred, and lost his clothes and shoes. His car was totaled. Because when you play with Mr. Buddy and this man named Smith, they don't play. These men who are dressed like *gangsters* and wear gloves on their hands and carry guns in the night; they don't play. Leon Jackson knew the man named Buddy. He had been in this poolhall on Saturday night, and the man had come up to him and bumped him and accused him of spitting on him. He pushed him around and hit him with a cue stick. Mr. Jackson was scared and ran out. I submit to you that Mr. Jackson, as he testified, is precisely the kind of person that would be scared. You saw him testify.

He went to the car to wipe the blood off the clear himself up. Defense counsel asked one of their witnesses, Lieutenant Maiden, if he had blood on him when he arrested him and he said no. But Mr. Jackson has said from the beginning that he went to the car to clean up, and he did. And when he got down there, this man who is from Annapolis, and who's not from 14th Street, decided he had this P.38 in his car and it was an equalizer. And this young man who's so tall and so strong and so young and so *arrogant*, has picked on him with a weapon, that being a cue stick. Mr. Jackson thought he was trying to rob him because there was no reason in the world why this man, right here, (indicating) sitting right here. He doesn't know why in the world Mr. Jeffries would do that to him, but decides that it's not going to happen to him, by golly. He's a citizen of America and he's got a right to come back down and even the score, he thinks. He says he was walking the street and minding his business, and testifies, you know I've always felt that if you stay by yourself and don't bother anybody you won't get bothered. Do you remember that? That isn't always the way it is in Washington, is it? It's not the sleepy little town that Annapolis is. So Mr. Jackson came back down to the poolhall with a gun, the equalizer. But he lost his courage to shoot that man. He'd been in trouble before for stabbing a man, and this scared him. He was afraid of Mr. Buddy. But however it happened, Mr. Jackson walked away until the policeman passed him. Not knowing the man was a policeman since he was in plain clothes, he told him, somebody tried to rob me, and kept on walking. And then they got him with a gun. And he paid for that. Now, that's an important point. I tell you Mr. Jackson is a good man; he paid for what he did, he pled guilty and he got that out of the way. And he told you

that he had forgotten about that matter with Buddy. He didn't want to get in anymore trouble about that. Mr. Jackson was wrong about carrying that gun, and he knew it and he had to face up to that trouble.

Well now, ladies and gentlemen, it's time for this man here named Buddy and this man here named Mr. Smith (indicating) to face up to it. Mr. Jackson knew the face of Mr. Buddy, and I submit to any of you, ladies and gentlemen, if I came to your door, and if I saw you on the street, and I jostled you and I took a stick and hit you across the head, and you came back within minutes and saw me again, under good lighting conditions, you'd remember me, wouldn't you? You'd remember me for the culprit that I am for doing that to you. And you wouldn't forget that face because it just didn't make sense that somebody would do that to you. You better believe Leon Jackson remembered that face, and he must have remembered that face wondering what was he doing in jail on Saturday and Sunday when he just came to town to have a little fun. Right or wrong, that's what he was here for. And he got out of jail on Monday, he wasn't concerned with any revenge with this man named Buddy. After all, he says Mary was a good woman and he went straight to the motel with her, didn't he? And he checked out of the motel the following Tuesday at noon, at checkout time. He went down to check on his car, and when he went down to check on his car, he found out it was all torn up and totaled. He had clothes missing, and he drove down to get the trunk fixed and get some gas and get a bite to eat. He came back, and he finally saw Mary again. Now this is important; he liked Mary, after all he comes to town very frequently to see her and go to motels, and he liked her. He was willing to wait for her. I don't know if that annoys anyone on the jury, but that's just

the way some men are, I suppose. That may not be the way to be, but that's the way some men are, and we know that. So Mr. Jackson was willing to wait for Mary, because after all she was a good woman, he thought. And then about 7:00 or 8:00 o'clock, she pointed somebody out to him. She pointed out the *mysterious* Mr. Smith. Now, why would she do that? Not like you and I walking down the street and she says, there goes Mr. Smith, he came to Washington. That's not what she did that for, is it? There was something about Mr. Smith that had that woman down there at 14th Street point him out and say, Hey, that's Mr. Smith and Rough-house. She said that's Mr. Smith, the man that sits right here in this brown jacket. Now, Mr. Jackson must have thought something when she points out this Mr. Smith. It's sort of like if one of you ladies and gentlemen were to take some youngster to a football game and go down on the sidelines and see Larry Brown doing calesthenics and say, Hey son, that's Larry Brown. And his eyes might light up. They don't forget Larry Brown, do they? He's a star, the darling of the city. And after the game you see Larry Brown as you're leaving the game getting on the bus. Do you think for a second that those children are going to forget Larry Brown, or forget what he looks like? They're not going to forget. They'll remember that day forever, because what an opportunity, they got to see Larry Brown They got to see him twice.

Now, Leon Jackson saw him in person. He saw our man Mr. Smith, right here. (Indicating) He was pointed out doing his calesthenics out on 14th Street. He was doing his thing down there on 14th Street. And the next time Mr. Jackson saw him, he was really doing his thing, wasn't he? Wearing the *big gangster hat and a coat and the gloves and the gun.* It was game time, and there's

Mr. Smith. You can better believe that when Leon Jackson turned around in that alley, something went off in his mind, and he says, there's the person that was pointed out to me. And oh, my God, he's got a gun in his hand, and for whatever reason, he's going to shoot me. Mary pointed him out, and there is he, and I'm not going to forget Mr. Smith. He didn't have to worry about forgetting Buddy because indelibly printed in his mind was Buddy, the man that had created all of his problems. The man he'd seen in the poolhall; the man he came back to shoot at first. He remembered Buddy, and when he turned around he saw those men. And the lighting conditions justify what he said, ladies and gentlemen.

How interesting it is that defense counsel, throughout the entire trial, had Leon Jackson up here. (indicating) They put Leon Jackson up here in the middle of the alley to get him away from this light down here on T Street, do you recall that? Then they put questions to Sergeant Carpenter as to where were the lights, and Sergeant Carpenter draws an egg here, and lo and behold, the egg encompasses the precise area where Leon Jackson says he was standing, and where the two assailants were standing. And therefore he could have seen very clearly the two assailants. So what did defense do then with their gymnastics? Well, they says, wasn't Mr. Jackson back further toward the mouth of the alley? They worked all day yesterday taking him up to the middle of the alley, and then when they got a bad answer, they brought him right back to the mouth of the alley again. That sounds sort of funny, doesn't it? Why did they do that? When they brought him back, they saw the trap they created for themselves. They made the sergeant draw an egg on this diagram here (indicating), and the sergeant did, and that shows plenty of lighting, if they were there.

And then the second egg indicates Mr. Jackson clearly could have seen his assailants under that light, also. So the only place where it's kind of dark is this little area between the two eggs here (indicating), and nobody ever put anyone in that area.

Mr. Jackson had the opportunity to observe, and I submit to you after seeing and listening to some of the things that I've said in this case, if I were to walk in that door and say, Your Honor, pow, and turn around, in your mind you'd say That's Robinson, the DA, wouldn't you? That's how quick Leon Jackson saw Mr. Smith and that's how quick he saw Sunny. But he had seen him before, and had put in his mind those faces that were pointed out to him so precisely. And you'd remember that day also, wouldn't you?

Ladies and gentlemen, the lights were good and he had seen them before. And do you know what's really interesting? The testimony shows that this woman or lady named Mary is just too scared to come and testify. She didn't want to get involved. Mr. Jackson refused to identify her at first because he didn't want to get her involved. Doesn't it stand to reason, especially when defense counsel asked the question, wasn't Mary really in the alley when the shooting occurred, Mr. Jackson said yes. And they said, You didn't see the shooting, did you? Isn't it true that somebody told you it was Buddy and Smith? And what's so marvelous about that revelation is that the government can't put in hearsay evidence like that. But the defense decided to do it to try to challenge the identification made by Mr. Jackson. But they fell into their own trap. By doing that, they brought the shadow of Mary right through that door and put her on the stand, speaking through Leon Jackson. That's what they did,

ladies and gentlemen. Although Mary has never touched the floor of this Court, has never walked up to that chair (indicating), and taken the oath, they asked for it and they got her testimony, didn't they?

Leon Jackson, but for the grace of God, would be a dead man today, left in a dark alley to die. *Mary would not come to testify. She was so scared.* Isn't it interesting if it's not this Buddy that they asked for, that she said on the scene it was Buddy and Smith; if it's not this Buddy and Smith, *how come she's so scared and won't come to testify?* Isn't that interesting, ladies and gentlemen? If she was scared and it's not this Buddy, she should come in here and say it, because she wouldn't be scared of anything, would she? *But she's scared, ladies, and gentlemen.* She's not coming to visit us here. Had Leon Jackson died in that alley, Leon Jackson couldn't have spoken from that stand and Mary would not have come. And a man would have died and no one would have known who did it, because no one was willing to talk. I say you cherish what Leon Jackson said, the little man who works down there at the Naval Academy and has been there for years. Who came to Washington and who was mistreated; although when he was here, was mistreating his wife, he was mistreated more than he was justified to have received. *But he was willing, through all of this fear, through all this perspiration and fear,* to come back and come to this city, when a city native, Mary, wouldn't come to Court. Justice echoes through this courtroom, ladies and gentlemen. That would be easy for Leon Jackson who is so scared, who doesn't want to have anything more to do with this *mystery man named Smith* and a man named Buddy, to forget about it and go on, and stay in Annapolis. Just forget about it and say how thankful I am that I'm still alive today. But he had the courage,

ladies and gentlemen, through all that fear, to come here and relive that moment for us, and rekindle all that fear. And I say it's not too much to expect to ask him to be believed. Is that too much? Do you think he's mistaken? Did the defense do anything to his testimony at all?

He's a simple man and can't use the best words. And in his own way he's not quite as articulate as other people, but you could fathom what the truth was. Perhaps some of you have known deaf mutes before and you know how they try to speak. They can't hear, but they try to give you sounds. Just because the sound that they give isn't as good as one of us might give, doesn't necessarily mean they're lying or don't know what they're talking about. It means that if you'll be patient and reflect for a moment and look at them in the eye, if you watch them as they try to talk with their body and with their hands and with their conscience, you can learn something, and you can judge whether it's true or it's false. And this is the way Leon Jackson did that for you. *He sat there perspiring and scared, and* told you it was these two men (indicating). Sergeant Carpenter came to the hospital with two names, Buddy and a man named Smith. He sat down next to the man who's arm was now paralyzed and can't be raised as I'm doing it now, and asked him about what happened. Mr. Jackson said it was Smitty and it was Buddy. Now, how ironic it is that when shown the photographs, without seeing the backs of the photographs, who did he pick out as the two that did it? He picked Smith and Buddy. He said that's Smith, Number 13, and it was, wasn't it? Isn't it funny that he, not having seen what name would be on the photographs, having never seen a photograph of Smith before, when he saw the picture of Smith said that is Smith, and lo and behold, what is the name of the man in that photograph? The same Mr. Smith

that sits here so solemnly now. Now, isn't it interesting that he didn't see the back of the photograph, Exhibit Number 5. He didn't know whether this man's name was Buddy or Charles, or anything. He said one of the taller men was Buddy. And you can't see the height of a man from that exhibit, can you. But when he saw the photograph after having told the sergeant one of the men, the taller one, is named Buddy, he said that is Buddy, the taller one. That's the one who without a doubt in my mind, came to kill me. Leon Jackson, boom.

Look at him smirk, ladies and gentlemen. Leon Jackson, *boom.* Jackson is now down on one knee, wounded, and the taller one, Buddy comes forward and fires. The defense is going to argue that Mr. Jackson was hit from the rear, in the left buttocks and in the back of the elbow. And they're going to argue that therefore Mr. Jackson could not see what had happened. But can't you see it happening as Leon Jackson is walking down the alley and his assailants are over here (indicating), over here to his left. Now here's Mr. Jackson walking and his assailants are on the left. And they call, Leon Jackson. And the assailants are way over here (indicating). And he turns, and *boom.* Now, can you see that? In the left buttocks. He goes down, on one knee and is shot in the back of the elbow; you better believe he was. Because here comes Buddy, and he's looking right at those two men standing there *in gangster clothes,* coming toward him. Buddy comes, he raises the elbow as if to stop a bullet, and boom; where would it hit him? In the back of the elbow, wouldn't it? And come out the front of the elbow. He's telling the truth about that elbow, ladies and gentlemen. Now, if he was down and raised the elbow and it had him in the back of the elbow – That's when he got to see those two men.

Moresc, importantly, when he turned and was first down, here's a man that perhaps could be dying. He's really down on his knee and is shot in the left buttocks. And he's looking at the two men standing there. Now, think how you would be. You're gunned down, you're on your knees, the lights are on and two men in *gangster outfits* that he's seen within days; Buddy he's positive of, and Mr. Smith who was just pointed out to him for some *mysterious* reason; and they're standing there with guns in their hands. And here comes Buddy to finish him off. You better believe he was looking at them. this could have been his last look in life. And they got him in the elbow and they went away.

Now, the defense for Mr. Buddy is that he had a bad foot and couldn't walk. Now, do you think for a moment these witnesses could remember what he was doing last April 18th? Do you think you can remember even before the Wednesday before last Thanksgiving when you were with your family, what they were doing? Do you think that if you were told, like the lady that had the bad leg in here – *They don't come in here necessarily to commit perjury;* but during the routine of the day, for example, Mrs. Jeffries ordinarily serves her son dinner at 11:30 or 12:00 when he gets home from work. That's just what happens almost every day. Now, is it too much when her son is charged with attempted murder, to just say, well it happens every day, it must have happened that day also. And that's what she's doing here. She can't say he was home that night, can she? She just can't do it. It's impossible, especially when you're not asked to remember it until August. There's just no way you can do it.

Now, ladies and gentlemen, also, the lady on the job with the bad leg. Do you think that she would remember that it was on the night of the 18th that the defendant, Mr. Jeffries, came hopping up four steps to answer the phone? Do you think you can remember something like that? You just can't do it. I submit that you probably can't remember what I was wearing when the trial started. And she's going to remember what Mr. Jeffries was doing back in April when she was reminded in August that she'd have to come in here and do it? She didn't bring any log down here that showed you that she had them written down. *She wasn't telling the truth, ladies and gentlemen. And for the same reason that his mother wasn't telling the truth.* Not so much to commit a flagrant violation of perjury or flagrant act of perjury, but because in the one case, he's her son, and the other case, she works with him on the job and probably likes the way he conducts himself with the kids. So when he does these things, in sort of a routine – every day occurrence, so much, for them to think that well, since he does this every day, he must have also did this on this particular day. When they were pinned down, they wouldn't specifically say under oath that he was there. All they would continue to say is that he must have been, because this is what he normally did.

Now, the doctor was a good witness, he told the truth. He's an honorable man. The doctor said Mr. Jeffries came in with a bad foot on the 17th and two days later Mr. Jeffries called the doctor and said, Doc, I'm feeling a whole lot better, didn't he? Now, what was two days later? That's the day that he gunned down Leon Jackson. Two days later. Isn't it interesting that the girlfriend testified that Mr. Jeffries had such a bad foot on Saturday night, and didn't she get caught when she realized

that he hadn't hurt the foot until Sunday? For this she back peddles and says that he had a sprained ankle and injured his foot playing basketball, just before he injured his foot stepping on a nail. Do you believe her, or do you believe Mr. Jackson. If you can't believe Mr. Jackson, and you don't want to believe Mr. Jackson, you can walk these men right through the door.

I say to you, ladies and gentlemen, be careful. There's some reason that these men did this. This was not done by accident. There's no mistaken identification where you have two youngsters charged with trying to rob somebody on a dark street that had never been seen by the victim before. If *you walk out of Court and two individuals or juveniles jump you and rob you in a fleeting second, and they're on trial for that robbery, perhaps you can say there's a reasonable doubt.* Perhaps if Mr. Jackson hadn't seen Mr. Smith five and a half hours before he was shot, it might be awfully hard to convict Mr. Smith, because of how quick he saw Mr. Smith before he was shot. Now, that would make sense, wouldn't it? But just like Larry Brown, Mr. Jackson knew that face, and that makes a difference.

Also, we don't have two kids that must be given some great benefit of a doubt. The government and Mr. Jackson are entitled to just as much opportunity and trial and justice and equality in this Court as are these two defendants. *These defendants are not two youngsters committing some small robbery.* These two men were dressed *like gangsters,* and whoever it was that shot that man down were also *dressed like gangsters.* And with the gloves and guns, and they walked down that alley for one reason, to kill the defiant man from Annapolis. *Leon Jackson, boom,*

boom, was there purpose? And they're not like two youngsters who should get some other chance. Because these men that called Leon Jackson in a dark alley, and dressed like gangsters, and go boom, boom with guns, aren't the kind of men that are entitled to even walk down an alley. They belong somewhere else. And we know why. *These are killers if you believe Mr. Jackson, and killers must be taken from Washington streets,* wherever they *are so that the sleepy people in the city can go to sleep and not be scared that their spouse might not come home.*

Thank you.

* * * * *

GOVERNMENT REBUTTAL CLOSING ARGUMENT

EXCERPT OF PROCEEDINGS

* * * * *

MR. ROBINSON: May it please the Court. Ladies and gentlemen, counsel said that when a case is weak the prosecutor will cloud the sky. I ask you whether you regard me as a windbag or not to listen to what I say now and I'll try to blow those clouds away and it'll be a clear day, and we will demonstrate the guilt of these two men.

They have chosen a route, ladies and gentlemen, which I submit will lead to the convictions of their clients. They have chosen to say Mr. Jackson doesn't tell the truth. However, Mr. Jackson might be a little bit confused. Had the defense chose to accuse Mr. Jackson of being confused and also an honorable man perhaps he

could have said, too, that Mr. Jackson was confused and a little frightened. But you see what counsel did here; they painted that man out as being in effect, a liar. They painted him out as a man who comes here immorally and carries a gun and commits crimes, and who lies about this and that. And I submit that you cannot believe that this man would lie about this, can you?

Ladies and gentlemen, in the first part of my argument when the case first was presented, I said these killers. What they are, are poor attempt killers. Their aim is not as good as their intent. They hit the man in the rear and in the elbow. Nonetheless, people that do this kind of activity attempt to kill – The doctor said but for an inch away the aorta would have been severed, and this man, Mr. Jackson, could have died on the operating table. That would have made these two men killers. I submit to you that Leon Jackson did not have to die in order for you to respect his right to live. Because the right to live is the most sacred of rights, however, you think of Leon Jackson.

It's interesting, ladies and gentlemen, to think that if Leon Jackson had kept the courage and returned to the poolhall on Saturday night, the 15th, when he had intended to shoot Mr. Jeffries – Had he kept the courage and shot Mr. Jeffries, we would have been in a reverse situation and I would have stood here on behalf of Mr. Jeffries and argued his right not to be shot, regardless of what he might have done earlier with the pool stick to that man named Jackson. Mr. Jackson would have been sitting over there with perhaps one of these very counsel on a charge of assault with intent to kill. What happened, ladies and gentlemen is that Mr. Jackson backed away.

He didn't have the courage and he backed away. He was caught with a gun and has paid the penalty for that.

Now, Buddy Jeffries and Mr. Smith did not back away. They came forward and they gunned that man down. Defense counsel doesn't say that he has confused Mr. Jackson and Mr. Jackson doesn't remember exactly what happened. They say he's lying. That's what they're saying about his credibility.

Counsel argued to you that Sergeant Carpenter is a misjudge of character. When this man showed a picture of Mary to Mr. Jackson – when he did there was a flicker of recognition that came to Mr. Jackson's face. Mr. Niblack mentioned that a flicker of recognition came to Mr. Jackson's face and he passed it by. How funny it is that Mr. Niblack does not mention the flicker of recognition Mr. Jackson had when he saw Mr. Smith's picture. The flicker of recognition Mr. Jackson had when he saw the picture of the taller man and said that's Buddy. He doesn't mention those flickers because they're trying to muddy the waters. But they say I cloud the sky.

Defense counsel will stand and apologize to you for the petty bickering and ask you to forgive them. I hope you don't take it as being too arrogant, but I do not apologize. Leon Jackson was shot down, almost assassinated. I don't apologize for the way I have tried to fight for that man. I stand here as his voice. That man from Annapolis, whether he has been convicted of carrying a gun or whatever, has the right to come to Court and be protected. I am his bullet-proof vest right now. I am protecting that man and I'm proud to protect that man. There will be no apology from me.

Consel will tell you about reasonable doubt, how marvelous it is. And it is a wonderful creature. Counsel talks to you about some bum comes to you from a bench who could be a Medal of Honor winner. And he defies his own argument, really, because as Johnny Cash sings there was a man named Ira Hayes and he once won the Medal of Honor after he planted the flag at Iwo Jima. This man died drunk in a gulley out West somewhere. So a bum can be a Congressional Medal of Honor winner, can't he? You don't really judge a man by how he looks, or where he comes from. You judge a man by what he is. He may be down like Mr. Jackson might have been down, but I say it's now time for Mr. Jackson to be able to get back up again and walk about the streets and not have to look over his shoulder, and that he be protected in this Court in this city in this country.

A good example of reasonable doubt might have been recently between Pittsburgh and Oakland. Everybody knew Pittsburgh had lost and that during the last play of the game a pass was thrown by the quarterback, it bounced off one of the defensive players – everyone thought the game was over. And Frank O'Hare made one of the most incredible plays he's ever made. He reached with one hand and caught it between his ankles and raced down the sidelines and scored a touchdown. And then defeat became victory. There was not a doubt in anybody's mind that Frank O'Hara had won the game for Pittsburgh. There was a doubt for a moment as to whether that ball had bounced off of Frank O'Hara's teammates' pads or one of the defensive players' pads. They stopped for a minute; they hesitated; they paused. Let us pause. This is an important part of our lives. We should pause and hesitate and not make a snap judgment. That's what a reasonable

doubt is all about. A momentary pause to reflect and think about it. An instant replay during the game later verified what the linesman and referees felt. That ball bounced off one of the Oakland players and the play was legal. The touchdown counted and Oakland plays for the championship on Saturday – Strike that. Pittsburgh plays for the championship on Saturday. Oakland almost played for the championship on Saturday, but for that one play. Oakland went on home. When you play the instant replay in this case, when you're all through pausing and looking at it, the replay of the truth and the testimony shows that Leon Jackson told the truth and he is the winner in this Court. And it's time that Mr. Smith and Mr. Jeffries over here (indicating) are the losers. They go on to their destinies.

This isn't a weak case, ladies and gentlemen. It's a case made strong by a man who formed the courage to come in here. It's a case made strong by a man who saw the face of Buddy and remembered that face because that man abused him. It's a case made strong by the fact that no matter when it was the man named Jackson saw that man (indicating) by the name of Smith. Defense counsel talks in marvelous terms of Mr. Jackson one time said that he saw him at 1:00 o'clock one time and the next time he saw him at 8:00 o'clock. But they can't disprove that Mr. Jackson did see him some time that day. So what did they do? They say well he's confused as to when he saw him. Sure he's confused. He was gunned down. But he's telling the truth, ladies and gentlemen, and through confusion can come the truth. There was confusion on that Pittsburgh football field, but the truth come through.

Believe Mr. Jackson's testimony because he's telling the truth, and through all the confusion if you'll just take the

time. Because it's serious when a man almost dies. You're going to find these men guilty. You'll do it because you'll know that your commitment as jurors is to pursue the truth you're going to believe Leon Jackson because that man is telling the truth.

These men through their witnesses are fictitious. I submit to you that man from Annapolis defied death, but he has not defied truth. Cross-examination is the most abrasive cleanser there is. It can take fiction and rub it away. If you wash long enough and hard enough the truth will come through and fiction will just evaporate. If you try to cross-examine truth you can scrub and wash as hard as you want, but the witness that's telling the truth will stick to his guns and he'll tell the story as best he knows it and you'll believe it.

These two attorneys with all their flair have scrubbed Leon Jackson for hours. The dented him, they scratched him, they bruised him, they confused him, they scared him, they attacked him. But through it all Leon Jackson said these men gunned me down. They're the same two men that I had seen previously. As God is my witness I tell you now to believe me and protect me. His Honor said that the sentencing is up to him, and it is. *But there's a different kind of sentence that a community must speak about when they believe that somebody has defied the law.* The defiance here is that these two men, *gangster* clothes or not, defied the law. They came down an alley that was lit. And do you know what's interesting? The irony of this – Sergeant Carpenter wrote in his notebrook – had notes and it said Mr. Jackson saw Rough House again and Rough House fingered him. He fingered him, and here come the two men, *the warriors of the night,* come down the alley and Mr. Jackson is not concerned.

If he'd have known it was Buddy when he first saw him, you can believe he would have been concerned. Mr. Jackson decides he's going to Annapolis and he's going to tell Mary that he's going. And he's coming up this alley and the two men, these warriors, are coming up too.

Ladies and gentlemen, I submit *that warriors* are the kind of men that carry guns into combat. And this was an unfair combat. That's what I mean by warrior; I don't mean any slurs by that. They're coming down the alley and they're on this side (indicating), on the left. And Leon Jackson is walking. He hears his name called and he turns and as he turns the first shot hits him in the buttocks as he turns. And Mr. Smith, as Mr. Jackson went down on his left knee, pathetically turning and raising an elbow as if some people would say, My God, please don't kill me, I won't bother you anymore, but let me go. And he sees those faces, and you better believe he sees them. And he reaches up with the rear of his elbow. And the testimony is that the bullet wouldn't have hit him in the face; the bullet hit his elbow and it was shattered beyond repair. The bullet shattered. It comes through the back of the elbow and out the front.

Ladies and gentlemen, even if that happened to Mr. Smith or Mr. Jeffries I'd stand up here and argue for him. But when they do that to a citizen wherever he is from or whoever he is, I say, listen to that man. I say listen to what I have to say. There's no reasonable doubt, ladies and gentlemen. Rough House fingered this man named Jackson. There's no reasonable doubt, ladies and gentlemen. Rough House fingered this man named Jackson. Mr. Jackson identified this man named Rough House in his hospital bed as having been with Smith. Now, if Mr. Jackson wanted to just get revenge and blame this on somebody,

why didn't be blame it on Rough House? After all, he had first seen Rough House with Mr. Smith, hasn't he? If he wanted to blame this on somebodoy he had seen that night, why didn't he just blame it on Rough House as being the man that fingered him?

The photographic identification. There was nothing improper about the way those photographs were shown. Ladies and gentlemen, Mr. Jeffries' mother testified that Exhibit Number 3, this hat (indicating), was his hat. And I placed this cap on Mr. Jeffries' head. The Court reporter took it down. Mr. Jeffries stood up and said, "I don't have a cap like that. I don't wear a cap like that." Blurted that out in Court, ladies and gentlemen. The reporter has that in the record. Why would he say that? Why doesn't he want to be associated with a hat like that? It could be that he didn't want to incriminate himself. His mother came in here and said this is Walter's hat. That's important, ladies and gentlemen. It's important because it shows that for that fleeting moment the statement by Mr. Jeffries that I don't wear caps like that, is not true.

Mr. Addams argues that some of the witnesses cannot remember exactly what the light conditions were and exactly where Mr. Jeffries was and what the light conditions were. I submit to you this was quite some time ago. The fact that Mr. Jackson can't recall every detail of an event that occurred some eight months ago is not surprising. How could Mr. Jackson remember everything that happened eight months ago? The defense puts on these witnesses who by comparison had nothing anywhere near as significant occur in their lives eight months ago. This worker that knows Mr. Jeffries; do you think she's going to remember a particular day eight months ago as Mr. Leon Jackson

would who almost died eight months ago? Mr. Jackson had reason to believe and reason to hope that one day he could rally and defy death and come in here and tell the truth, and have somebody accept him.

Mr. Niblack talks about the records that show that the man had difficulty in seeing. Mr. Niblack mistakes what the doctor stated. The doctor said, didn't say that he had difficulty in seeing, the doctor said he had difficulty in understanding his needs. Isn't that what the doctor said? Isn't that what Dr. Dalton said? Now, you remember His Honor cautioned you at that time after I read something from that page that was improper and then later counsel put it in and made it proper. Remember, the testimony shows that after the identifications were made of Mr. Jeffries and Mr. Smith – Mr. Smith right here (indicating). After the identification was made and one of the identifications was of a man about six foot three, and see how tall Mr. Jeffries is, haven't you? And the other was about five ten or five eleven. And you recall how tall Mr. Smith is. You've seen him, ladies and gentlemen. He says that one didn't have hair on his face. When you retire to deliberate, look at Number 5 in that photograph of the lineup. See if you make the same mistake that they accuse Mr. Jackson of making. You can barely see those whiskers. If you're in a dark alley with lights enough to see a face, are you studying a person's whiskers or are you studying enough to remember a face? And all of a sudden this big cannon goes off and your flooded with deadly pain.

Ladies and gentlemen, in this identification nicknames were given and not only by the man that was shot, but by his lady friend as she cradled him in the alley. She said Smith and Jeffries, that's who did it. And I submit

again to you that's as if she was here testifying. This is just as if a phantom has come in here; a witness that we can't find. Sergeant Carpenter testified that Mary had said on the scene that Smith and Buddy did it. And the photos identified Buddy and Smith. Now, if that's not common sense logic as to who did the shooting, I don't know who it is.

Finally, ladies and gentlemen, Sergeant Carpenter testified in the hospital after Mr. Smith had been identified by the complaining witness, Sergeant Carpenter said shortly thereafter he started getting phone calls from the complainant, Mr. Jackson, and the Court wouldn't let me go into, and quite properly, what was in the conversation. But it's interesting that after that conversation phone calls were made from Mr. Jackson to Sergeant Carpenter. And the evidence reflects that. And on this page which I cannot read to you it states, "Do you give the patient's phone number to anyone calling." I wonder why. If this doesn't support the fact what I'm about to read to you now, that Leon Jackson knew who shot him and he was scared because of it, I don't know what will.. This is what was written on that note there, "Patient states that he is having a hard time making the decision as to whether to take the man who shot him to Court." Take the man that shot him to Court. You better believe he knew who shot him, and he was now beginning to get a little scared about facing such a culprit in the courtroom. He summons the courage and he came and faced him, and I say the time has come for you, ladies and gentlemen, to stand up and face him and look him right in the eye and give them both a smile of achievement and a smile of pride, and tell them, Mr. Jeffries, you don't fool us. Mr. Smith, you don't fool us. You gunned that man down. You assaulted him with a dangerous weapon. Because that is

a dangerous weapon. You walked up, Mr. Jeffries, you weren't satisfied, you walked up and boom. And if that's not the intent to kill, what is, ladies and gentlemen? But for an elbow that happened to catch a shot, perhaps Leon Jackson would be dead today.

Mr. Smith assaulted him with a dangerous weapon. He had a gun. You don't have to know whether he pulled the trigger or not. But he did have that gun. Mr. Smith assaulted him with the intent to kill. I submit to you that two men dressed in that kind of outfit walking down that alley after Rough House has fingered Leon Jackson, they don't walk down there to wave guns and say how are you doing. They went down there to kill him. And they didn't do it because they're not such good shots. But Mr. Jeffries shot him, and that's assault with intent to kill while armed. That's just short of murder in the first degree.

I submit to you, ladies and gentlemen, as I conclude my remarks, don't you defy the truth. This man named Jackson has come here and told the truth. These two defendants have sat here with a presumption of innocence throughout this trial. And they have been clothed in that wonderful garment which is guaranteed for them by the Courts and by the Constitution which says they are presumed innocent until proved guilty, and not like that derelict bum that Mr. Addams talked about. They sit here with their clothes tattred and torn because piece by piece that magnificent garment has been torn from them. And I know when you stand up you'll stand up and say, these men are guilty.

MR. NIBLACK: Your Honor, his time is up and he's calling names again.

THE COURT: Mr. Niblack, I determine when his time is up. You keep your seat or your time will be up. Excuse me, ladies and gentlemen, please continue your argument.

MR. ROBINSON: Ladies and gentlemen, my time is up and theirs is too. You tell them that their time is up and tell them that they're guilty. And you'll be happy that you had the courage to do it.

Thank you.

THE COURT: Ladies and gentlemen, in argument Mr. Robinson again referred to their being dressed in those kind of clothes and coming down the alley. The Court admonishes you that the type of clothing relating to identification has nothing to do with their guilt or innocence or nothing to do with this case.

Ladies and gentlemen, you will now be taken by the marshals to go to lunch.

* * *

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1930

WALTER E. JEFFRIES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1974. A petition for rehearing was denied on March 25, 1974; and the petition for a writ of certiorari was filed on June 24, 1974. The

jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether it was error for the trial court to deny petitioner's motion for judgment of acquittal based upon the purported inherent unreliability of the one-witness identification.

2. Whether the court of appeals properly concluded that alleged prejudicial remarks of the prosecutor did not amount to reversible error.

STATEMENT

Following a jury trial in the Superior Court of the District of Columbia, petitioner and a co-defendant were convicted of assault with intent to kill while armed (22 D.C. Code 501, 3202), assault with a dangerous weapon (22 D.C. Code 502), and carrying a pistol without a license (22 D.C. Code 3204). Petitioner was sentenced to a term of imprisonment of thirteen to thirty-nine years on the first count and forty months to ten years on the remaining two counts, the sentences to run concurrently. The court of appeals affirmed in a thorough opinion (Pet. App. A, pp. 4a-14a).

The evidence at trial revealed that on April 15, 1972, Leon Jackson, a cook at the United States Naval Academy, drove from Annapolis, Maryland, to the District of Columbia to visit a friend, Marian Fletcher (T. 242-244). After his arrival that afternoon, Jackson entered a pool hall to use its bathroom.

Once inside the pool hall, Jackson and petitioner became involved in an altercation; one jostled the other, words were exchanged, and petitioner knocked Jackson down with a pool cue and then kicked him several times (T. 244-247). Jackson retreated to his car, took a pistol from the trunk, and returned to the pool hall where he brandished the pistol at petitioner, who promptly fled. As Jackson was leaving the pool hall, he was stopped by the police and arrested for carrying a pistol without a license. He spent the remainder of the weekend in jail (T. 247-249).

On Tuesday, April 18, 1972, Jackson met Miss Fletcher at around 8:00 p.m. and arranged to meet with her again later that evening. When she had not arrived by midnight, Jackson became annoyed and began looking for her to tell her that he was returning to Annapolis (T. 255-256, 260). He soon observed her in an alley parallel to Fourteenth Street, between Wallach Place and T Street (T. 256-258). As he approached her, she made a waving motion as if to indicate that he should go back, but, because of his anger, he ignored her gesture (T. 263). Meanwhile, Jackson saw two men advancing toward him and then passing him, although he paid no particular attention to them (T. 262-264). Suddenly, from behind him, he heard someone call out, "Leon Jackson" (T. 264). As he turned, he saw that both men were pointing pistols at him (T. 264). The shorter of the two men fired one shot, hitting Jackson in the left buttock. The taller of the two then stepped for-

ward and fired, hitting Jackson in the rear of his left elbow, which he had raised in an effort to protect himself (T. 268-269, 326-327, 374-379). Jackson testified that he recognized the taller man as petitioner, the man with whom he had had the previously described altercation in the pool hall (T. 247, 270-272). On cross-examination of Jackson, counsel for petitioner elicited that Miss Fletcher had told him, immediately after the shooting, that petitioner and co-defendant Smith were responsible (T. 333-334, 516).

Two days later Jackson was visited at the hospital by a police officer to whom he gave a detailed description of petitioner as a Negro male in his twenties, about 6'3" tall, weighing 150 pounds, wearing a black leather coat, black boots and gloves (T. 500, 512). Jackson selected a picture of petitioner and one of co-defendant Smith from an array of ten photographs, positively identifying each, and he also indicated the correct nickname of the person in each photograph that he had selected (T. 274-276, 286, 288-289, 483-488). Jackson subsequently identified petitioner and his co-defendant at police lineups (T. 276-277, 293-294, 494, 497).

Petitioner presented an alibi defense. His mother testified that he arrived home on the night in question during the Perry Mason Show, which is on from 11:00 p.m. to 11:30 p.m. (T. 550). She testified that petitioner did not leave the house again that night (T. 552). Petitioner's girl friend corroborated this story (T. 600-603).

ARGUMENT

1. Petitioner apparently contends that Jackson's identification, which was the only eyewitness identification testimony, was so unreliable that the trial court should have entered a judgment of acquittal. This claim is without merit.

It should be emphasized that petitioner raises no due process challenge: he alleges no impropriety or suggestivity with regard to the procedures employed by the police in either the photographic array or the lineup. Rather, his claim of error rests entirely upon a challenge to the credibility of Jackson, based on alleged limitations of his opportunity to observe his assailant during the course of the shooting. Such matters must be resolved by the triers of fact and not by the trial court, the court of appeals or this Court.[1] Absent a claim that the identification was constitutionally infirm, the trial court properly submitted the identification testimony, along with the other evidence, for consideration by the jury at trial. *Russell* v. *United States*, 408 F. 2d 1280, 1285 (C.A. D.C.), certiorari denied, 395 U.S. 928; cf. 18 U.S.C. 3502. The weight or credence to be accorded to Mr. Jackson's testimony was uniquely a jury question. Only if there had been no evidence upon which

---

[1] Since in our view no constitutional claim is raised and the matter of whether to submit the challenged evidence to the jury is peculiarly of local concern, this Court ordinarily would not consider the issue. See *General Motors Corp.* v. *District of Columbia*, 380 U.S. 553, 556-557; *Fisher* v. *United States*, 328 U.S. 463, 476.

a reasonable mind might fairly have found guilt beyond a reasonable doubt could the court properly have taken the case from the jury. Such a situation was not presented here.

Assuming *arguendo*, however, that it would have been proper for the trial court to exclude the identification evidence or grant a motion for judgment of acquittal on the basis of its own assessment of the reliability or credibility of the witness Jackson, petitioner's claim is no more substantial. For in evaluating the reliability of an identification, no one criterion is dispositive; rather the test is "whether under the 'totality of the circumstances' the identification was reliable * * *." *Neil* v. *Biggers*, 409 U.S. 188, 199. The factors to be considered include, *inter alia*, the victim's opportunity to observe, his prior description of the criminal, his degree of attention and certainty, and the length of time between the crime and the confrontation. *Id.* at 199-200. Applying these criteria, all of which were thoroughly explored by defense counsel in over one hundred pages of cross-examination of Jackson (T. 295-385, 437-439, 464-469), it is apparent that Jackson's identification of petitioner was not unreliable.

Petitioner had "ample opportunity to observe them [his assailants] during the shooting" (Pet. App. A, p. 11a). The alley was lighted, and he had seen petitioner before (T. 259, 272). He testified that "* * * I heard my name called and I turned around and I recognized both of them. I looked right at them." (T. 271). The fact that the events moved quickly

and the victim only had a "fleeting" look at his assailant is not dispositive. Moreover, petitioner's claim that the medical testimony cast doubt on the victim's ability to observe is inaccurate. The fact that the bullets struck Jackson's left buttock and the rear of his left elbow is not inconsistent with his claim that the first bullet struck him as he was turning and the second hit his elbow when he raised it to protect himself (T. 374-379).

Similarly, petitioner's claim that Jackson "paid absolutely no attention * * * to his assailants" (Pet. 15) is not borne out by the record. Although Jackson testified that he did not pay any attention to them when they initially passed him in the alley, his testimony is clear that he was alerted after they called his name (T. 271) and that he was certain that one of them was the man with whom he had been involved in the fight on the preceding Saturday (T. 272). Moreover, as noted, Jackson had given the police a description of petitioner (T. 500, 512), and the time that elapsed between the crime and his selection of petitioner's picture from a group of ten photographs was only two days[2] (T. 475, 483-484).

In short, we submit that the court of appeals correctly concluded that "[i]t cannot be said * * * that under these circumstances there was a very substantial likelihood of misidentification" (Pet. App. A, p. 11a).

---

[2] Approximately a month and a half after the shooting, on June 6, 1972, Jackson identified petitioner at a lineup (T. 276-277, 494).

2. Petitioner also contends that the court of appeals applied an incorrect standard in evaluating instances of alleged prosecutorial misconduct. He states (Pet. 12-13) that the applicable standard is set forth in *Kotteakos* v. *United States*, 328 U.S. 750, 765. However, he claims that the court below did not apply this standard (Pet. 13), but that it "actually established a 'beyond a reasonable doubt prejudice' standard" (Pet. 12). This claim is inaccurate.

In its opinion, the court of appeals stated that the appropriate test for measuring prosecutorial misconduct is (Pet. App. A, p. 8a):

> [W]hether we can say, "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." The decisive factors are the closeness of the case, the centrality of the issue affected by the error, and the steps taken to mitigate the effects of the error. [*Gaither* v. *United States*, 134 U.S. App. D.C. 154, 172, 413 F.2d 1061, 1079 (1969) (citations omitted); *Garris* v. *United States*, *supra* at 512.]

The omitted citations indicate that the quoted opinions are in turn quoting from *Kotteakos*; thus petitioner's claim that the court of appeals failed to apply the test of *Kotteakos* is inaccurate.

Moreover, in applying that standard to the instances of alleged prosecutorial misconduct here (Pet. App. A, pp. 7a-10a), we submit that the court below did not err in concluding that "because of the strength of the government's case and because of the

correcting instructions by the trial judge and his commendable effort to keep the prosecutorial misconduct at a minimum, we do not think these alleged errors reached the level of substantial prejudice" (Pet. App. A, p. 11a). See *Donnelly* v. *DeChristoforo*, No. 72-1570, decided May 13, 1974.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

PETER M. SHANNON, JR.,
TERENCE M. BROWN,
Attorneys.

SEPTEMBER 1974.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 [illegible] 58